92-1501

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DEAN WITTER REYNOLDS, INC.,
JACK A. VICKERS, III AND WILLIAM B. GRAHAM,
Petitioners,

VS.

HOWARD ROSENTHAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

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COUNTER STATEMENT OF THE CASE

Howard Rosenthal, respondent herein, brought this action on behalf of himself and all other purchasers of Castle Pines North Metropolitan District General Obligation Refunding Bonds, Series 1986 A and Series 1986 B ("the Bonds") in the United States District Court for the District of Colorado alleging that petitioner Dean Witter Reynolds, Inc. ("Dean Witter") and others had violated Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as asserting pendent state common law claims for negligent misrepresentation and fraud. The claims arise out of alleged omissions of material facts and misrepresentations in the Official Statement issued by Castle Pines North Metropolitan District (the "District") pursuant to which the Bonds were sold to the investing public. Dean Witter acted as the underwriter for that offering and, in fact, was the seller from whom respondent Rosenthal actually purchased his bonds.

The complaint alleges, inter alia, that the Bonds were sold on the basis of unsupported and unsupportable claims that more than 3,000 housing and commercial units could and would be built within the District, even though defendants' own studies showed that the maximum land use capacity of the District for such housing units was far less than that being represented. Accordingly, funds which were to support the payment of the interest on the Bonds, as well as the repayment of principal, could not be generated as represented in the Official Statement. It was not until the fall of 1990, when the District ceased to pay interest on the Bonds and filed for protection under the Bankruptcy Code that respondent and the other investors who purchased the Bonds, learned that they had been misled.

On April 11, 1991, respondent commenced this action. All defendants answered the complaint, except petitioner Dean Witter, which moved to dismiss. In accordance with a stipulated scheduling order, an amended complaint was then filed and served on July 3, 1991. On July 17, 1991, defendants filed motions to dismiss, based, in part, on this Court's June 20,1991 decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, __ U.S. __, 111 S.Ct. 2773 (1991).[1] In recognition of the retroactive application of the holding and the Supreme Court's denial of a petition for rehearing in Lampf, respondent agreed to dismiss the action without prejudice and such an order was entered on September 23, 1991.

Shortly after the Supreme Court denied the petition for rehearing in Lampf, Congress began consideration of legislative proposals to extend the limitations period for private Section 10(b) actions beyond the one year/three year period announced in Lampf. Congress addressed the most immediate problem created by the Lampf decision, the retroactive application of the one/three rule to "cases that were pending at the time that [Lampf] came down" -- by adding Section 27A to the 1934 Act, 15 U.S.C. §78aa-1. 137 Cong. Rec. S18623 (daily ed. Nov. 27, 1991) (Sen. Bryan). Section 27A "return[s] plaintiffs and defendants to exactly the position that they had on June 19, 1991," by restoring pre-Lampf limitations periods for plaintiffs who filed suit up until

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[1]In Lampf, this Court held that the one-year/three-year limitations period found in Sections 9(e) and 18(a) of the Exchange Act, 15 U.S.C. §§78i(e) and 78r(a), governed actions arising under Section 10(b). Prior to the Lampf decision, a complaint was considered timely in the Tenth Circuit if filed within three years of the discovery of the fraud. DeHaas v. Empire Petroleum Company, 435 F.2d 1223, 1225 (10th Cir. 1970).

the day before Lampf was decided. 137 Cong. Rec. S17382 (daily ed. Nov. 21, 1991) (Sen. Riegle).

Section 27A accomplishes this goal through two related provisions: subsection (a), which protects plaintiffs whose claims were subject to dismissal under Lampf but were still pending when Section 27A was enacted, and subsection (b), which protects plaintiffs whose claims had been dismissed as untimely after Lampf. Subsection (a) provides that:

> [t]he limitation period for any private civil action implied under section 78j of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

Subsection (b) provides that suits which were timely filed prior to Lampf and were dismissed as untimely following Lampf "shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section".

Section 27A was signed into law by the President on December 19, 1991. On February 7, 1992, less than sixty days after its enactment, respondent filed his Motion for Reinstatement, asserting that pursuant to Section 27A, his action was no longer time barred. Petitioner Dean Witter challenged the Motion for Reinstatement, arguing, inter alia, that Section 27A unconstitutionally violated the separation of powers doctrine. The District Court agreed, denying respondent's Motion for Reinstatement on June 15, 1992, [Appendix to the Petition for Writ of Certiorari (hereinafter "App.") at A-5]. On appeal, the United States Court of

Appeals for the Tenth Circuit reversed the District Court's dismissal in a decision dated December 17, 1992, which upheld the constitutionality of Section 27A. (App. at A-1).

SUMMARY OF THE ARGUMENT

1. There is no conflict among the courts of appeals regarding the constitutionality of Section 27A of the 1934 Act, 15 U.S.C. §78aa-1, and there is no reason to believe that other courts of appeals will not follow the well-reasoned decisions of the Seventh, Ninth, Tenth and Eleventh Circuits upholding the statute.[2] Berning v. A.G. Edwards & Sons, Inc., No. 91-3318 (7th Cir. March 25, 1993); Julius Gray v. First Winthrop Corp., No. 90 CV 02600, 1993 WL 100059 (9th Cir. April 7, 1993)(citing Anixter with approval at WL * pp. 10, 11 and 18); Anixter v. Homestake Production Co., 977 F.2d 1533 (10th Cir. 1992); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992).[3]

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[2]No other court of appeals has yet to rule on the constitutionality of Section 27A. The Second Circuit, however, has observed in dicta that "[a]lthough the parties have not suggested that section 27A is unconstitutional, we are aware that several district courts have so held, but...we are unimpressed by the cogency of their analysis." Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc., 967 F.2d 742, 751 n.6 (2d Cir. 1992).

[3]In addition, this issue has been fully briefed in four other circuits, argued in three of those circuits, and is scheduled for argument in May 1993 in the remaining circuit. See, Axel Johnson, Inc. v. Arthur Andersen & Co., No. 92-7624 (2d Cir. argued Dec. 21, 1992); Plaut v. Spendthrift Farm, No. 92-5591 (6th Cir. argued mar. 1, 1993); Gray v. First Winthrop Corp., No. 91-16907 (9th Cir. argued Mar. 10, 1993). Argument in Simmons v. TGX Corp., No. 92-3375 (5th Cir.), and Pacific Mutual Life Ins. Co. v. First Republic Bank Corp., No. 92-1662 (continued...)

Review of the constitutional questions presented would therefore be both premature and unnecessary.

The overwhelming majority of district courts that have addressed the issue have found Section 27A(a) constitutional. See, e.g., In re American Continental Corp./Lincoln Savings & Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992); Maio v. Advanced Filtration Sys. Limited, 795 F. Supp. 1364 (E.D. Pa. 1992); Brown v. Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992); Axel Johnson, Inc. v. Arthur Anderson & Co., 790 F. Supp. 476 (S.D.N.Y. 1992). Moreover, the few district court decisions finding Section 27A(a) unconstitutional all antedate the decisions by the Tenth and Eleventh Circuits, let alone the recent Seventh and Ninth Circuit decisions, upholding the statute. See, e.g., Johnston v. Cigna Corp., 789 F. Supp. 1098 (D. Colo. 1992); In re Britchard Sec. Litig., 788 F. Supp. 1098 (N.D. Cal. 1992). The Tenth Circuit's decision in Anixter, (as well as the Eleventh Circuit's decision in Henderson) is now being followed routinely by the district courts,[4] and respondents

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[3](...continued)
(5th Cir.), is scheduled for May 3, 1993. Argument has yet to be scheduled in Freeman v. Laventhal & Horwath, Nos. 92-6123 & 92-6191 (6th Cir.). In view of the advanced posture of those cases, review by this Court would not streamline litigation in the circuit courts.

[4]Agapitos v. PCM Investment Company, 1992 WL 365643 at 3 (M.D. Ga., Dec. 8, 1992); Aquilio v. Manaker, 1992 WL 349672 at 10 (N.D.N.Y., Nov. 13, 1992); Dendinger v. First Nat. Corp., 1992 WL 318593 at 8 (E.D. La. Oct. 28, 1992); In re First American Center Securities Litigation, 807 F. Supp. 326, 331 (S.D.N.Y. 1992).

The following cases decided since the Tenth Circuit's decision in Anixter, though not citing that decision, have also found Section 27A (continued...)

are not aware of a single district court decision that has held Section 27A unconstitutional since the Tenth Circuit upheld the statute in this case.[5] As discussed above, in the absence of any conflict, real or potential, there is no need for review by this Court.

Section 27A, subsection (a), provides in pertinent part

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[4](...continued)
constitutional: In re: Integrated Resources Real Estate Limited Partnerships Securities Litigation, 1993 U.S. Dist. Lexis 195 at 18 (S.D.N.Y., Jan 11, 1993); Schick v. Ernst & Young, 1992 WL 383188 at 4 (S.D.N.Y., Dec. 16, 1992); RAM Investment Associates v. Citizens Fidelity Bank & Trust Co., [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶97,010 (S.D.N.Y., Sept 24, 1992); In re Crazy Eddie Securities Litigation, 802 F. Supp. 804 (E.D.N.Y., Sept. 16, 1992); Arioli v. Prudential-Bache Securities, Inc., 800 F. Supp. 1478 (E.D. Mich. 1992); Kenney v. Deloitte, Haskins & Sells, 1992 U.S. Dist. Lexis 14600 (N.D. Cal., Sept. 2, 1992); Cannistraci v. Dean Witter Reynolds, Inc., 796 F. Supp. 619 (D. Mass. 1992).

[5] Petitioners' assertion that Section 27A, if not struck down by this Court as unconstitutional, will impair the federal interest in judicial economy and finality and promote forum shopping (Pet. 12-13) is without foundation. Furthermore, even if this Court were to accept the reasoning underlying petitioners' argument, any application by this Court of petitioners' reasoning would have no practical utility. Because Section 27A requires parties either to have a pending Section 10(b) claim or, if their claim had been finally dismissed, to have moved for reinstatement within sixty days of the passage of Section 27A, most, if not all, of the litigation involving Section 27A commenced more than one year ago. It is, therefore, unlikely that many more decisions on the constitutionality of Section 27A will be issued on the district court level. Consequently, the interests in judicial economy, uniformity and finality which this Court emphasized in Lampf, and which are endorsed in the other caselaw cited by petitioners, will not be implicated by Section 27A. Petitioners arguments to the contrary are specious and should be rejected by this Court.

that the limitations period for any pending action under Section 10(b) of the 1934 Act commenced on or before June 19, 1991--the day prior to this Court's decisions in Lampf and James B. Beam Distilling Co. v. Georgia, __ U.S. __, 111 S.Ct. 2439 (1991) -- "shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." This case, asserting violations of Section 10(b), when filed in 1991, was instituted within the time permitted by the limitations period applicable in the District of Colorado. Moreover, plaintiff filed a motion for reinstatement within 60 days of the date of enactment of Section 27A. The Tenth Circuit, in this case, in Bank of Denver v. Southeast Capital Corp., No. 92-1235 (10th Cir. October 14, 1992) and in Anixter, the decision which underlies the decision of the Court of Appeals herein, correctly applied the new limitations period established by Congress in Section 27A and properly rejected petitioners' constitutional challenge that Section 27A(a) violates the separation of powers doctrine. (App. A-15). In the absence of any conflict, real or potential, there is no need for review by this Court.

ARGUMENT

I. SECTION 27A REPRESENTS A VALID EXERCISE OF CONGRESSIONAL POWER

2. The Court of Appeals for the Tenth Circuit correctly concluded that Section 27A(a) is constitutional. Petitioners argued below, as they do here (Pet. 8-10), that Congress, by enacting Section 27A, impermissibly directs the outcome of certain litigation and attempts to control the adjudicative process without making any change in the

controlling provisions of the existing law, thus running afoul of United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). The Tenth Circuit in Anixter properly rejected that argument:

> This case is not Klein. Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. Surely Congress has the power to change a rule of law and make that change applicable to pending cases. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

(App. A-40 (citations omitted)).

In Anixter, the Tenth Circuit found further justification in the unanimous decision by this Court, which rejected a Klein challenge last year in Robertson v. Seattle Audobon Society, __ U.S. __, 112 S.Ct. 1407 (1992), and upheld the constitutionality of Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745 (a statute intended to affect specifically identified pending litigation). The Court in Robertson reasoned that Section 318 "modified the old provisions" and did not "direct any particular findings of fact or applications of law, old or new, to fact." 112 S.Ct. at 1413. Following Robertson, the Tenth Circuit concluded that "Section 27A does not direct certain factual findings or impose a rule of decision for §10(b) claims. It changes the law." (App. A-41

(footnote and citations omitted)).[6]

Indeed, the Tenth Circuit, in Anixter (which is the basis of its decision here) held that Section 27A (a) was intended to change the law:

> Before its enactment, all §10(b) claims were governed by the one-year/three-year Lampf statute of limitations as applied retroactively by Beam. 'Section 27A changed the law by limiting the one-year/three-year rule to prospective application only and by subjecting Section 10(b) claims filed prior to June 19, 1991 to the limitations period determined to be applicable by the court in which the action was filed.' In enacting Section 27A, Congress exercised a key legislative power.

(App. A-42 (citations omitted)).

Finally, even if Section 27A did not change the

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[6]In Henderson, 971 F.2d at 1573, the Eleventh Circuit independently reached the identical conclusion:

> Like the Compromise at issue in Audobon, Section 27A does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991. But Congress has not interfered with the judicial process. The Act does not require courts to make any particular findings of fact or applications of law to fact. Any effect on pending cases is solely a result of a change in the underlying law. We therefore hold that Section 27A does not violate the doctrine of separation of powers.

underlying law, it is still distinguishable from Klein. Klein does not affect the validity of statutes like Section 27A that merely withdraw a procedural defense without attempting to dictate the outcome of a case, whether or not such statutes can be characterized as "changing the law." See, United States v. Sioux Nation of Indians, 448 U.S. 371, 402-407 (1980) (statutory amendment that waived the government's defense of res judicata to allow adjudication of a claim, but did not attempt to control the outcome of the adjudication, was constitutional and distinguishable from Klein). Here, just as in Sioux Nation, Congress has not attempted to determine the outcome of the litigation.

Section 27A does not direct how the courts must decide the merits of any particular Section 10(b) claim; it simply establishes the applicable limitations period. The ultimate outcome of any particular case to which Section 27A applies depends on a court's determination of a wide variety of issues beyond the statute of limitations. Even as to the limitations issue, a court will apply the relevant limitations period in light of the particular circumstances of the case. In sum, the courts, not Congress, will determine whether a particular claim is timely and meritorious under Section 27A.

II. THE RETROSPECTIVE APPLICATION OF SECTION 27A DOES NOT RENDER IT UNCONSTITUTIONAL

3. Petitioners herein also argue, as they did below, that Section 27A is unconstitutional because it operates only retrospectively. (Pet. 11). However, Congress' power to enact retrospective legislation is undisputed. United States v. Sioux Nation of Indians, 448 U.S. 371, 396 (1980); United States v. The Schooner Peggy,

5 U.S. (1 Cranch) 103, 110 (1801). Nothing in the Constitution prohibits Congress from acting solely retrospectively when the problem it seeks to address is itself retrospective.[7] Furthermore, petitioners' arguments are clearly undercut by the proposition, which the Court confirmed in United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982), that retrospective operation will be given to a statute if such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." Section 27A(a) clearly meets those criteria.

In a similar vein, petitioners argue that the retrospective nature of Section 27A is in direct conflict with the Court's holding in James B. Beam Distilling Co. v. Georgia, __ U.S. __, 111 S.Ct. 2439 (1991). (Pet. 11). This contention is incorrect for two distinct and independent reasons. Initially, as the Tenth Circuit recognized in Anixter, a majority of the Court in Beam expressly refused to hold that the Constitution mandates a prohibition on selective prospectivity. "Beam was carefully crafted to garner a plurality to agree only that retroactive application of a rule of law announced in a case was a matter of a choice of law and not of constitutional import." (App. A-44). See also, Beam, 111 S.Ct. at 2448, 2449. Because the bar against selective prospectivity has no constitutional status, it cannot support a declaration that Section 27A is

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[7]The Eleventh Circuit rejected a similar argument in Henderson, 971 F.2d at 1573:

> [Appellant] attempts to distinguish Audobon on the ground that the compromise in that case had both retroactive and prospective effect whereas Section 27A has only a retroactive effect. We fail to see the significance of such a distinction. (citations omitted).

unconstitutional.

In addition, Beam is concerned solely with the obligation of courts under Article III to apply existing rules of decision, not with Congress' power to change the rules of decision. Beam, 111 S.Ct. at 2444, 2449-51. Even if Beam were thought to have constitutional implications for Article III courts, there is no basis for reading into Beam a restriction on the power of Congress, under Article I, to enact a statute establishing or changing the rules of decision, retrospectively or otherwise.

III. THE TENTH CIRCUIT'S DECISION IN NO WAY IMPINGES ON PETITIONERS' DUE PROCESS RIGHTS

4. Petitioners argue that Section 27A conflicts with the past "precedents" of this Court, which purportedly state that a judgment cannot be taken away by subsequent litigation.[8] However, this Court has previously addressed

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[8] The authorities cited by petitioners are inapposite. Petitioners first argue that Hodges v. Snyder, 261 U.S. 600 (1923), and Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856), stand for the proposition that "an act of Congress cannot annul the judgment of a court already taken upon the private rights of parties." (Pet. 14) Petitioners err in their assertion that the propositions for which they cite these two precedents are in any way binding upon this Court.

Hodges, involved the South Dakota Supreme Court's upholding of an injunction preventing the consolidation of several school districts because that consolidation "was not authorized by any law then in force." Id. at 602. The South Dakota legislature thereafter passed legislation validating the formation of the consolidated school district. Upon further

(continued...)

this issue in Chase Sec. Corp. v. Donaldson, 325 U.S. 304, (1945), wherein it held, with regard to statutes of limitations, that ". . . they have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now is called a fundamental right . . ." 32 U.S. at 314 (quoted in Anixter, App. A-42 (citations omitted)).

Petitioners essentially contend that the prior dismissal of this action conferred upon them a vested right to a judgement which cannot be taken away by Congress. However, since statutes of limitations clearly fall within the ambit of legislative power, petitioners' argument on this issue necessarily fails.

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*(...continued)
appeal, the South Dakota Supreme Court upheld the legislature's validation of the consolidated school district. On appeal from the South Dakota Supreme Court, this Court discussed adjudicated private rights and subsequent legislation affecting those rights in dicta. Hodges, 261 U.S. at 603. However, this Court's holding in that case clearly related to public and not private rights.

When reviewing legislative action with regard to adjudicated public rights, the Hodges Court wrote, the legislature acts within the confines of its power: when it subsequently annuls a judgement; the court must thereafter forego enforcing that judgement. Hodges, 261 U.S. at 603. The same situation occurred in The Wheeling & Belmont Bridge Co., 59 U.S. at 431, wherein this Court ruled that the right to navigate a river was a public right and that, therefore, post judgement legislation effected an annulment of the lower court's decision. Petitioners have relied solely on dicta for the proposition that Congress cannot legislatively nullify the judgement of a court already taken upon the private rights of parties. Neither the decision in Hodges nor the one in The Wheeling & Belmont Bridge Co. offered such a holding.

The Anixter opinion continues in this vein, quoting Chase, 325 U.S. 304, 315-16 (1945):

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking life, liberty or property without due process of law. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is a per se offense against the Fourteenth Amendment. Id.

Clearly, as the Tenth Circuit recognized in Anixter, "in 27A, Congress evinced a legitimate purpose to protect the reasonable expectations of litigants who relied on established law in filing §10(b) actions. Section 27A is rationally related to that legislative purpose." (App. A-43, 44 (citations and footnote omitted)).[9]

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[9]The petitioners attempt to bolster their due process argument by adding a Fifth Amendment due process prong to the argument. Petitioners claim that Section 27A is retroactive in its application and as such is subject to an added due process burden than that which must be borne by legislation which will be applied prospectively. Petitioners rely on Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984), and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). In R.A. Gray & Co., 467 U.S. at 730, this Court wrote that in Turner Elkhorn Mining Co., 428 U.S. at 16-17, it had previously recognized:

(continued...)

The Tenth Circuit's opinion in Anixter is clear and well reasoned. In addition, its holding with respect to the constitutionality of Section 27A is bolstered by its subsequent and consistent holding here and in Bank of Denver, and the decisions of the Seventh , Ninth and Eleventh Circuits in Berning, Julius Gray and Henderson.

CONCLUSION

For the reasons stated, and given the absence of any conflict among the courts of appeals regarding the constitutionality of Section 27A of the 1934 Act, the petition for writ of certiorari should be denied.

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[9](...continued)

> that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow... that what Congress can legislate prospectively it can legislate retrospectively.' The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process and the justifications for the latter may not suffice for the former. But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

The Tenth Circuit, in Anixter, properly concluded that Congress, in enacting Section 27A, "evinced a legitimate purpose to protect the reasonable expectations of litigants who relied on established law in filing §10(b) actions. Section 27A is rationally related to that legislative purpose". (App. ___) See also, Henderson, 971 F.2d at 1574 (rejecting equal protection challenge). Accordingly, this Court should reject petitioners' Fifth Amendment due process argument.

Respectfully submitted,

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